

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEREK A. WAITHE,

Defendant.

Case No. 01-cr-40017-11-JPG

**MEMORANDUM AND ORDER**

This matter comes before the Court on Defendant Derek A. Waithe's *Pro Se* Motion (Doc. 584) for Reduction. The Court believes, however, that Defendant intends to invoke 28 U.S.C. § 2255 because the relief he seeks is only available through such a motion.

The Court is hesitant to construe this as a § 2255 motion without a clear indication that Mr. Waithe intends to invoke that statute. “[T]he court cannot so recharacterize a pro se litigant’s motion as the litigant’s first § 2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law’s ‘second or successive’ restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing.” *Castro v. United States*, 540 U.S. 375, 377 (2003).

Therefore, the Court **WARNS** Defendant Waithe that if he does not file a motion to withdraw his pending motion (Doc. 584) on or before **June 23, 2017**, the Court will construe it as a § 2255 motion and Mr. Waithe will then be subject to the second or successive filing requirements contained in 28 U.S.C. § 2255, ¶ 8. The Court also **CAUTIONS** the plaintiff that the time for filing a § 2255 motion based on a right asserted that was initially recognized by the

Supreme Court and made retroactively applicable to cases on collateral review is one year from the date of the decision. The Clerk of Court is **DIRECTED** to send the defendant a copy of this order along with a § 2255 form.

**IT IS SO ORDERED.**

**DATED:** 5/23/2017

*s/J. Phil Gilbert*  
**J. PHIL GILBERT**  
**DISTRICT JUDGE**